No. 11,953

IN THE

United States Court of Appeals

For the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

STATEMENT OF JURISDICTION.

This is an appeal from a decree of the District Court of the United States for the Territory of Alaska, Fourth Judicial Division, quieting appellees' title to two placer mining claims.

The district court had jurisdiction under R.S. 2325 and 2326 as amended, 30 U.S.C.A. 29, 30; Act of June 6, 1900, c. 786, 31 Stat. 322, 48 U.S.C.A. 101; Act of June 7, 1910, 36 Stat. 459, 48 U.S.C.A. 386; and Compiled Laws of Alaska, 1949, sec. 56-1-91, formerly Compiled Laws of

Alaska, 1933, sec. 4001. This court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. ....., 28 U.S.C.A. 1291, 1294 (formerly Judicial Code sec. 128; 28 U.S.C.A. 225). The pleadings and proceedings necessary to show the existence of the jurisdiction are the complaints (Tr. pp. 2-5, 6-10), the answers (Tr. pp. 10-19, 20-27), the replies (Tr. pp. 28-29, 29-31) and the decree (Tr. pp. 63-67).

STATEMENT OF THE CASE.

Except as hereinafter specifically noted appellant's statement of the case is adequate. We limit ourselves to an outline of the case and corrections in the statement of facts.

The Snow Shoe Fraction was located in 1908 by W. E. Sullivan and the L Association was located in 1908 by John McCandlish for himself and others. Titles to both placer mining claims were subsequently acquired by appellees.

In 1941 appellant on behalf of herself and another staked out claims over-lapping those of appellees, and in 1945 appellant applied for patents for the over-lapping claims in the United States Land Office at Fairbanks. Appellees duly filed adverse claims in said Land Office and commenced two actions in the district court below to quiet title in support of their adverse claims, one concerning The Snow Shoe Fraction (Case No. 5493, Tr. pp. 2-5), and the other concerning the L Association (Case No. 5494, Tr. pp. 6-10).

The cases were consolidated for trial before the court with an advisory jury which, after being instructed (Tr. pp. 32-45), returned an advisory verdict in favor of appellees on all points, finding that valid locations were made of both claims and that all required annual labor had been done (Tr. pp. 46-47).

On April 1, 1948, the court below made and filed its Findings of Fact and Conclusions of Law (Tr. pp. 53-59, 60-62), and on April 6, 1948, entered its decree quieting appellees' title to The Snow Shoe Fraction and the L Association, denying to appellant any rights in said claims, and allowing appellees their costs of suit, including a reasonable attorney's fee fixed by the court at $500 (Tr. pp. 63-67). Appellant perfected an appeal to this court. Appellees do not question the jurisdiction of this court or the sufficiency of the procedure in prosecuting the appeal.

The appellant has chosen to argue only three questions on appeal: the repeal of the Waskey Act (App. Br. pp. 12-48), the validity of The Snow Shoe Fraction location (App. Br. pp. 48-50), and the propriety of allowing attorney's fees (App. Br. pp. 50-52).

Appellant's first argument is based on the contention that appellees' claims were forfeited because of failure to perform annual labor or to file proofs of labor as required by the Waskey Act. It is conceded for purposes of this appeal that the performance of labor and filing of notices of intention to hold mining claims under the statutes suspending annual labor have the same effect.

We call the court's attention to appellant's misstatements on pages 10 and 11 of the brief:

> "* * * there was a complete failure to do assessment work or to file proofs of labor evidencing it, during many of the years intervening between 1909 and 1939, and the propriety of the claimed improvements shown in some of the proofs of labor may be subject to question;"
>
> * * * * *
>
> "* * * no attempt was made by appellees to show the performance of annual labor during such years, * * * there were so many years when no proofs of labor or suspension notices were filed at all, it seems unnecessary to devote time to a consideration of the legal sufficiency of some of the suspension notices or the eligibility of certain of the claimants therein to claim exemption * * *"

These statements are gratuitous, unsupported by any evidence in the transcript, and fly in the teeth of the verdict (Tr. pp. 46-47) and the Findings of Fact (Tr. pp. 58-59) to the effect that all required labor was done.

Appellant's confused analysis and inaccurate statement of facts as to the effect of a reversal of the judgment on the Waskey Act is best answered by merely stating that should the case be reversed then appellees must be given the opportunity to prove their performance of annual labor or the filing of notices of intention to hold mining claims, as the case may be.

Before commencing their discussion of the legal questions of this appeal, appellees wish to call attention to the illuminating opinion of District Judge Pratt in the court below (*United States Smelting Refining & Mining Co. v. Lowe* (D.C. Alaska 1947) 74 F.Supp. 917). Although not a part of the technical record on appeal (*Parker v. St. Sure*

(9 Cir. 1931) 53 F. 2d 706) it is included in the Transcript of Record in part (pp. 144-165). The opinion deals with appellees' first two points at length, and we refer this court to it for a helpful discussion of the issues.

SUMMARY OF ARGUMENT.

1. The Waskey Act was repealed by implication in 1938.

   Background of General Mining Law
   Resumption of Labor
   Burden of Proof
   Passage of Waskey Act, March 2, 1907
   Passage of Act of May 31, 1938
   Review of Authorities
   Extent of repeal of Waskey Act

2. The repeal of the Waskey Act put the burden of proving forfeiture, before and after its repeal, on appellant.

3. The Snow Shoe Fraction, as described in the Decree Quieting Title, is a validly located placer mining claim.

4. Appellees are entitled to the attorney's fee set by the lower court.

ARGUMENT.

1. The Waskey Act Was Repealed By Implication in 1938.

In order to place the Waskey Act (Act of March 2, 1907, c. 2559, 34 Stat. 1243; 48 U.S.C.A. 384) and the Act

of May 31, 1938, c. 297; 52 Stat. 588; 48 U.S.C.A. 381, in proper focus a brief chronology is important.

In so far as annual labor is concerned, the general mining law of the United States is contained in Revised Statutes, section 2324, stemming from the Act of May 10, 1872, c. 152; 17 Stat. 91, 92; 30 U.S.C.A. 28. On June 6, 1900, R.S. 2324 read in part as follows:

> "On each claim located * * * and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. * * * but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

This section enunciates the doctrine of "Resumption of Labor." This doctrine reflects the policy of our legal system which frowns upon forfeitures, in mining law as well as in the general field of equity. If a claimant actually begins work in good faith and diligently prosecutes it to completion before adverse rights vest, that is, before a stranger does all things necessary to make a valid relocation, there is no forfeiture.

A concomitant rule, of equal age and dignity, is that a person claiming a forfeiture has the burden of proving it.

"As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meagre and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk v. Meagher,* 104 U.S. 279. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law" (*Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291, 301, per Field, J.).

The following authorities are to the same effect:

Quigley v. Gillett (1894) 101 Cal. 462, 35 Pac. 1040;
Harris v. Kellogg (1897) 117 Cal. 484, 49 Pac. 708;
Beals v. Cone (1900) 27 Colo. 473, 62 Pac. 948, 958 (App. Dism. 188 U.S. 184);
Morrison's Mining Rights (16th Ed. 1936) p. 130;
Lindley on Mines (3rd Ed. 1914) Vol. 2, sec. 645, pp. 1605, 1606.

Indeed, the doctrine of resumption of labor would have little practical value without this procedural rule of burden of proof, for over the years proof of labor becomes more and more difficult what with change of ownership and deaths of witnesses. Were it not for the procedural rule claim jumpers could disregard the doctrine of resumption of labor with relative impunity, knowing full well that in many cases the rightful owner could not sustain the burden of proof, especially where he acquired his ground

years after the original location, as did the appellees in the instant case.

The procedural rule applies from the moment a valid location is shown. A claimant who proves a valid mining location has made a *prima facie* case that as of the date of his pleading he has maintained his claim in good standing by performing the annual labor.

Hammer v. Garfield Mining Co. (1889) 130 U.S. 291, 300;

Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska 496;

Renshaw v. Switzer (1887) 6 Mont. 464, 13 Pac. 127.

(The jury found that the locations of both The Snow Shoe Fraction and the L Association were valid and that the required annual labor had been performed (Tr. p. 46). The court confirmed this finding (Tr. pp. 55, 56, 58). Appellant failed to prove any forfeiture.)

Such was the general mining law of the United States outside of Alaska when on May 17, 1884, Congress, in setting up a civil government for Alaska, provided in part that "* * * the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, * * *" (23 Stat. 24, 26, c. 53, sec. 8).

In the Act of June 6, 1900, Congress reaffirmed its intent as expressed in the Act of May 17, 1884, by stating in the later Act:

> "The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska; * * *" (31 Stat. 321, 329, c. 786, sec. 26; 48 U.S.C.A. 381).

The "laws of the United States relating to mining claims, mineral locations, and rights incident thereto" being undisputed, it is clear that on June 6, 1900, the following rules applied in Alaska:

(a) A locator or his successor in interest could prevent a forfeiture by resuming labor on his mining claim and completing it before a second or junior locator completed all acts necessary to constitute a valid relocation. Appellant concedes (Br. p. 10) that under the Act of June 6, 1900, and if the Waskey Act has been repealed, appellees had not forfeited their claims at the time appellant's were located.

(b) Once a valid location is proved the burden is on the junior locator to prove by clear and convincing evidence that a forfeiture resulted from failure to do the necessary work.

Seven years after the Act of June 6, 1900, Congress passed the so-called Waskey Act which, in view of its importance here, we set forth in full:

> "An Act To amend the laws governing labor or improvements upon mining claims in Alaska.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter lo-

cated. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claim shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

> Sec. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. Approved March 2, 1907" (34 Stat. 1243, c. 2559).

As the title indicates, the purpose of the Waskey Act was to amend the laws governing labor or improvements upon mining claims in Alaska, and the result was that Alaska laws were no longer in accord with the general mining laws of the United States. The Waskey Act was grafted on the general mining law previously made applicable to Alaska and changed the mining laws of Alaska in three particulars:

First: It permitted the owner of a claim to file an affidavit of performance of labor, such affidavit being *prima facie* evidence of such labor. This effect of the Waskey Act is not in issue here.

Second: If such an affidavit was not filed the owner had the affirmative burden of proving labor.

Third: If the owner failed to do the work, his claim was automatically forfeited.

The Waskey Act was immediatey enforced by the courts, which held that it repealed the resumption of labor provisions of the Act of June 6, 1900.

> *Thatcher v. Brown* (9 Cir. 1911) 190 Fed. 708, 711;
> *Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co.* (9 Cir. 1914) 210 Fed. 599.

It necessarily followed that "the laws of the United States relating to" the burden of proof as enunciated in

Hammer v. Garfield, supra, and the other cases cited on pages 7 and 8, above, were repealed.

The Alaska mining law by virtue of the Waskey Act remained an anomaly in the field of annual assessment work until 1938 and deprived Alaskans of the generous resumption of labor privileges extended elsewhere by the federal mining laws. In that year the Act of May 31, 1938, amended the Act of June 6, 1900, in the following manner (provisions not important to this discussion being omitted):

> "To amend section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes', approved June 6, 1900.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes', approved June 6, 1900 (31 Stat. 321), is amended to read as follows:
>
> 'Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: * * *' " (52 Stat. 588, c. 297).

Obviously this is substantially the same as the corresponding part of the Act of June 6, 1900.

Appellees contend, and the court below so held, that the Act of May 31, 1938, necessarily repealed the conflicting

sections of the Waskey Act. Such repeal was by implication, there being no express repealing clause. This had the effect of again extending to Alaska the rules on resumption of labor and burden of proof formerly a part of Alaskan law under the Act of June 6, 1900. Appellant has conceded (App. Br. p. 10) that appellees had resumed work prior to her locations, assuming there had been any failure to do assessment work.

We think that the rules governing implied repeal are well set forth in the following quotations from appellant's own authorities:

> "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, will although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy, provided the conflict, inconsistency, or repugnancy is of the character and degree requisite to the application of the rule. Obviously, there is no implied repeal on the ground of inconsistency or repugnancy where there is no conflict, antagonism, inconsistency, or repugnancy between the acts in question, as where the later act is merely affirmative, cumulative, or auxiliary. Indeed, it has been declared generally in some cases that inconsistency or repugnancy is necessary to effect a repeal by implication; but this statement is incorrect in that it leaves out of consideration the general rule that, even though the two acts are not repugnant, a later act impliedly repeals an earlier act where it covers the whole subject thereof and plainly shows that it is intended as a substitute therefor" (59 C.J. 910).

Mr. Sutherland's work on Statutory Construction (3d Ed. Horack 1943) Vol. 1, pp. 463-465, states the rule as follows:

> "When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict."

There are accordingly two indications of repeal by implication: (a) where there is inconsistency or repugnancy, and (b) where the later enactment covers the entire field. In the case at bar *both* indications are present.

The two Acts are inconsistent and repugnant in the following respects:

The Waskey Act	**The 1938 Act (General Mining Law)**
(a) Affidavit of performance was *prima facie* evidence thereof.	(a) No affidavit and no *prima facie* evidence.
(b) Burden of proof on owner to establish performance if affidavit not filed.	(b) Burden of proof on person alleging forfeiture.
(c) Claim forfeited forthwith upon expiration of labor year without performance of assessment work.	(c) Claim not forfeited; locator permitted to resume work prior to relocation by another.

The inconsistencies and repugnancies are apparent. Since the Waskey Act repealed the Act of June 6, 1900 (*Thatcher v. Brown,* supra; *Ebner Gold Mining Co. v.*

Alaska-Juneau Gold Mining Co., supra), the Act of May 31, 1938, must have repealed the Waskey Act (*Koprivica v. Sather* (1945) 10 Alaska 593). Any "presumption" against such repeal is defeated and the legislative intent to repeal is shown by these inconsistencies and repugnancies.

> Crawford, The Construction of Statutes (1940) sec. 310, pp. 630-631 (App. Br. p. 12).

Where, as here, two acts cannot stand together and operate on the same matter, in the same place and at the same time, the latter repeals the earlier or, in the words of Mr. Justice Field, if the two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first * * *" (*United States v. Tynen* (1870) 11 Wall. 88, 92).

If the laws of the United States apply in Alaska, then a locator may prevent a forfeiture by resuming work and a person claiming forfeiture must prove the forfeiture. If these two rules do not apply in Alaska, then the mining laws of the United States do not extend to Alaska. There is no middle ground. Either the Waskey Act has been repealed or the Act of May 31, 1938, does not mean what it says. Unless it can be shown how a mining claim can be forfeited at 12:00 M. on July 1st in any labor year because of failure to do the representation work, and at the same time the owner can save the claim by resuming work thereafter and prior to another's location of the same ground, appellant's position is untenable. We submit that it is.

Turning now to cases supporting appellees' position, we find ample support for the rule that unless there is evidence of contrary legislative intent the later inconsistent act repeals the earlier one. This is the rule of the federal courts and of the state courts, including the courts of Oregon on which appellant leans so heavily. The following cases are illustrative.

In 1918 the Louisiana legislature passed a general statute concerned with chattel mortgages. In 1934 it passed a statute dealing with oil laborers' liens which impliedly amended the act of 1918. In 1936 the Act of 1918 was substantially reenacted, and the Federal District Court in Louisiana held that the Act of 1936 nullified the implied amendment of 1934.

In re Lent (*W.D. La.* 1940) 34 F.Supp. 700.

An Act of Congress dated March 3, 1891, provided for appeals to the circuit court in certain injunction cases. The Act of February 18, 1895, amended the prior act and increased the class of appealable cases. The Act of June 6, 1900 (not the Act here involved), purported to amend the Act of March 3, 1891, and omitted some of the classes of cases added by the intermediate act without mentioning that act. It was held that the Act of June 6, 1900, necessarily repealed the intermediate act of February 18, 1895.

Heinze v. Butte & B. Consol. Min. Co. (9 Cir. 1901) 107 Fed. 165;

Columbia Wire Co. v. Boyce (7 Cir. 1900) 104 Fed. 172.

Such cases show the federal rule to be that without evidence of contrary intent, the later legislative enactment

repeals the earlier, and so the Act of May 31, 1938, repealed the Waskey Act.

In *State v. Schaumburg* (1921) 149 La. 470, 89 So. 536, the state court held that a general law concerning the filling of vacancies on school boards throughout the state impliedly repealed a special law concerning vacancies in one parish where the general law was approved one day after the special law.

The same result has been reached by other federal and state courts in similar situations involving inconsistent statutes:

Henrietta Mining & Milling Co. v. Gardner (1899) 173 U.S. 123;

Safe Harbor Water Power Corp. v. Federal Power Com'n. (3 Cir. 1941) 124 F.2d 800;

H. Rouw Co. v. Crivella (8 Cir. 1939) 105 F.2d 434 (reversed on other grounds, 310 U.S. 612);

Anchor Line v. Aldridge (S.D. N.Y. 1921) 280 Fed. 870;

In re van Der Schuur (N.D. Cal. 1937) 20 F.Supp. 42;

Drach v. People (1916) 61 Colo. 584, 158 Pac. 812;

State v. Lightner (1915) 77 Ore. 587, 152 Pac. 232;

Whitfield v. Davies (1914) 78 Wash. 256, 138 Pac. 883;

Reynolds v. Board of Education (1903) 66 Kan. 672, 72 Pac. 274;

Morris v. Neider (1940) 259 App.Div. 49, 18 N.Y.S. 2d 207;

People v. Board of Com'rs of Cook County (1931) 345 Ill. 172, 177 N.E. 705;

In re Metcalf's Estate (1935) 319 Pa. 28, 179 Atl. 587;

Leach v. Exchange State Bank (1925) 200 Iowa 185, 203 N.W. 31.

Perhaps the best refutation of appellant's position was made by the Supreme Court of Pennsylvania in *In re Metcalf's Estate,* supra. That case involved conflicting claims of the Commonwealth of Pennsylvania and the City of Philadelphia against a decedent's estate. The appellant Commonwealth claimed priority by virtue of an act of 1915 superseding an act of 1834. The City claimed the act of 1915 was superseded by the re-enactment in 1917 of the portions of the act of 1834 giving the City priority. In upholding the claim of the City, the court said (179 Atl. at p. 588):

> "Appellant's argument, based on the rule of law that, 'In so far as a later law is merely a re-enactment of an earlier one, it will not repeal an intermediate act which qualifies or limits the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first' (59 C.J. 926 sec. 528f), *ignores the exception to the rule that, 'where the re-enacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed'* " (italics ours).

We have already referred to the case of *Thatcher v. Brown* (9 Cir. 1911) 190 Fed. 708, the first case to hold that the Waskey Act impliedly repealed the Act of June 6, 1900. This case arose in the second division of the Dis-

trict Court of Alaska and was ultimately decided by the Court of Appeals for the Ninth Circuit. In his opinion, Judge Ross pointed out that the Waskey Act changed the rule of the Act of June 6, 1900, by declaring that a claim was immediately forfeited upon the failure to do the required annual labor. Judge Ross concluded that the Waskey Act necessarily impliedly repealed the Act of June 6, 1900, and he said (p. 711):

> "It is true that the act of March 2, 1907, contains no express repeal of any previous provision of the statutes, and it is also true that implied repeals are not favored. Still the courts are not at liberty to ignore a purpose to repeal clearly indicated by irreconcilable provisions. Here we have an old mining statute, made applicable to Alaska by the act of June 6, 1900, expressly providing that while a failure on the part of the locator to complete the required annual assessment work would render the ground covered by the location open to relocation, yet such work might be resumed by the locator or his legal representatives, provided no other location had intervened, and then a later act to amend the law upon the subject in so far as mining claims in Alaska are concerned, which in terms declares that upon the failure of the locator to perform the required amount of work upon the claim within the year 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.'
>
> Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier

act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one."

The court today is faced with the exact reverse of the situation faced by Judge Ross and his colleagues, Judges Morrow and Wolverton, and the judgment of the court below could be affirmed on the basis of their decision alone. Certainly if the inconsistencies which existed between the 1900 act and the Waskey Act were so repugnant and so irreconcilable as to require a repeal by implication of the earlier act, the same inconsistencies and repugnancies compel a repeal of the Waskey Act by the Act of May 31, 1938. It has been so held by the District Court for the Territory of Alaska, Fourth Judicial Division, in *Koprivica v. Sather* (1945) 10 Alaska 593, and by the same court in this case.

Examination of the cases cited by appellant reveals that she has failed to appreciate the importance of the legislative chronology. In this case exact analysis of the facts reveals this pattern:

Statute 1—the Act of June 6, 1900;

Statute 2—the Waskey Act, repealing Statute 1;

Statute 3—the Act of May 31, 1938, re-enacting pertinent portions of Statute 1.

Shortly stated, the question in this case is whether an intermediate act repealing an earlier act is itself repealed by the re-enactment of the earlier act.

Five of appellant's cases can be immediately distinguished and discarded on the basis of this analysis for the reason that in each of them the intermediate act did not repeal the earlier act and thus could not be inconsistent with the re-enactment.

Posadas v. National City Bank (1935) 296 U.S. 497 (App. Br. pp. 12, 13, 25);

George v. City of Asheville, N. C. (4 Cir. 1935) 80 F.2d 50 (App. Br. p. 13);

Eddy v. Kincaid (1895) 28 Or. 537, 41 Pac. 156 (rehearing denied, 41 Pac. 655) (App. Br. pp. 13, 14, 17);

Bayless v. Douglas County (1910) 57 Or. 301, 111 Pac. 384 (App. Br. pp. 13, 14, 17);

Rosa v. City of Bandon (1914) 71 Or. 510, 142 Pac. 339 (App. Br. pp. 14, 18).

Appellant has quoted from *Eddy v. Kincaid,* supra (App. Br. p. 17) but has neglected to mention that on petition for rehearing (41 Pac. 655) the court specifically held that there was no conflict between the intermediate and the other acts.

Six of appellant's cases can similarly be distinguished and discarded for the reason that in each either there was no intermediate act or the intermediate act was not in issue.

Great Northern Ry. Co. v. United States (8 Cir. 1907) 155 Fed. 945 (App. Br. pp. 13, 26);

Brun v. Lazzell (1937) 172 Md. 314, 191 Atl. 240 (App. Br. p. 23);

Duggan v. Ogden (1932) 278 Mass. 432, 180 N.E. 301 (App. Br. p. 23);

State v. Cochran (1909) 55 Or. 157, 104 Pac. 419 (App. Br. pp. 14, 18);

State v. McGinnis (1910) 56 Or. 163, 108 Pac. 132 (App. Br. pp. 14, 17, 23);

In re Wilson's Estate (1936) 102 Mont. 178, 56 P.2d 733 (App. Br. pp. 13, 23).

Although appellant has attempted to make much of the thesis that the re-enacted portions of a statute are not repealed for the instant between the repeal of the earlier statute and its re-enactment, *this is not in point* for the reason that it is clear that Statute 1 in this case (the Act of June 6, 1900) *was* repealed by Statute 2 (the Waskey Act).

Thatcher v. Brown (9 Cir. 1911) 190 Fed. 708, 711;

Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (9 Cir. 1914) 210 Fed. 599.

The rule relied upon by appellant has validity when properly applied, as in *Great Northern Ry. Co. v. United States,* supra. In that case the question was whether an act violating Statute 1 (the Elkins Act of 1903) was punishable under Statute 3 (the Hepburn Act of 1906; there was no Statute 2) when the act occurred in 1905 but prosecution was not commenced until after 1906. The defendant claimed that the act of 1906 repealed the act of 1903 and thus wiped out all violations not already in the course of prosecution. Had the defendant prevailed

there would have been an hiatus of some three years during which no violations of the Elkins Act could have been punished unless prosecution was commenced before 1906. Such a result would have been ludicrous and was properly avoided in the *Great Northern* case and in the other cases cited above.

That is not this case. Statute 1 (the Act of June 6, 1900) had been repealed in Alaska for thirty-one years prior to the enactment of Statute 3 (the Act of May 31, 1938).

In three of appellant's cases it was specifically held that Statute 3 did repeal Statute 2 or at least rendered it without effect.

State v. Cochran (1909) 55 Or. 157, 104 Pac. 419 (App. Br. pp. 14, 18);

State v. Schluer (1911) 59 Or. 18, 115 Pac. 1057 (App. Br. pp. 14, 18);

State v. Lightner (1915) 77 Or. 587, 152 Pac. 232 (App. Br. pp. 14, 20, 22).

In *State v. Schluer,* supra, the charter of the City of Joseph gave the City Council power to license liquor sales. Thereafter, in 1904, a state local option law was passed. Among the provisions was one forbidding a single precinct to repeal prohibition until the whole county voted to repeal. In 1910 the Constitution of the State of Oregon was amended to give each city power to license liquor sales but stating that "such municipality shall within its limits be subject to * * * the local option law * * *." The court held that the constitutional amendment of 1910 impliedly repealed the local option law of 1904, in that at

any time a city could repeal prohibition without awaiting action by the entire county. The actual decision of the case was against the City of Joseph for the reason that land outside the city limits was included in its precinct and therefore the repeal did not affect that precinct.

This case is not squarely in point since the amendment of 1910 was not a re-enactment of the early charter of Joseph, but it does show that in Oregon, as elsewhere, implied repeal results from an inconsistent enactment. Certainly the case offers appellant no aid and comfort.

The other two cases cited above are similar in their effect. Appellant has attempted (App. Br. pp. 20-22) to twist *State v. Lightner,* supra, into a favorable decision. We submit that on the basis of our analysis and Judge Pratt's reasoning (*United States Smelting Refining & Mining Co. v. Lowe,* supra, at p. 922; Transcript of Record, p. 150) appellant has failed.

Appellant has also cited at least seven cases which, although they contain Statute 1, Statute 2 and re-enacting Statute 3, cannot be considered as holding contrary to appellees' present position because in each case the court had a very practical reason for finding that the legislature had not intended to repeal the intermediate act: the legislature had not known that the intermediate act had repealed the earlier act.

Stingle v. Nevel (1880) 9 Or. 62 (App. Br. pp. 14, 18);

Eddy v. Kincaid (1895) 28 Or. 537, 41 Pac. 156 (App. Br. pp. 13, 14, 17);

Small v. Lutz (1902) 41 Or. 570, 67 Pac. 421 (App. Br. pp. 13, 17);

Renshaw v. Lane County Court (1907) 49 Or. 526, 89 Pac. 147 (App. Br. pp. 14, 17);

State v. County Court (1909) 54 Or. 255, 101 Pac. 907 (App. Br. pp. 12, 14, 18);

City of Woodburn v. Aplin (1913) 64 Or. 610, 131 Pac. 516 (App. Br. pp. 14, 19);

Noonan v. City of Portland (1938) 161 Or. 213, 88 P.2d 808 (App. Br. pp. 13, 22).

Prior to 1876 Oregon law authorized the directors of school districts to issue warrants to clerks to collect taxes in the same manner as state and county taxes were collected. In 1876 the legislature gave the sheriff power to collect such taxes by levy and sale. In 1878 the legislature revised the old school law and in so doing re-enacted the old provision as to the collection of taxes. The court in *Stingle v. Nevel,* supra, held that the act of 1878 did not repeal the act of 1876. The reasoning of the court is illuminating. The act of 1876 repealed the old law only by implication and there had been no decision so holding prior to *Stingle v. Nevel.* Therefore, the court decided, the legislature could not have known that the old act was repealed, and without such knowledge there could be no intent to repeal the intermediate act.

The other cases cited above all contain the same factual situation. If we compare this with the case at bar the distinction is clear: Congress was well aware of the fact that the Waskey Act had repealed the Act of June 6, 1900, because it had been so held by this court long before May

31, 1938 (*Thatcher v. Brown,* supra, in 1911; *Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co.,* supra, in 1914).

Only one of appellant's cases remains to be distinguished:

Allison v. Hatton (1905) 46 Or. 370, 80 Pac. 101 (App. Br. p. 16).

The facts of that case offer clear evidence that no implied repeal of the intermediate act was intended by the legislature. An Oregon statute of 1885 created the County of Columbia and fixed its boundaries. In 1898 the legislature fixed more definite boundaries for the adjoining County of Washington and in so doing took a strip of land from Columbia as described in the act of 1885 and added it to Washington. Specific provision was made for recording in Washington title documents to said strip already recorded in Columbia. Unfortunately there remained a no-man's land between Columbia and Washington counties not included in the description of either. To remedy this defect the legislature in 1901 amended the act of 1885 to include this forgotten area. In so doing it re-enacted the remainder of the description of Columbia county without regard to the effect of the intermediate act of 1898. No provision was made for re-recording title documents to the strip transferred to Washington by the Act of 1898 such as was made in that act.

On these facts the court necessarily held that the Act of 1901 was not intended to repeal the Act of 1898. To have held otherwise would have thrown titles into a state of wild confusion all to no purpose.

Such a case is far removed from this one. Here there is no such evidence of lack of intent to repeal; on the contrary, and consistent with all authorities on the subject, the intent to repeal is affirmatively shown by the inconsistencies and repugnancies of the Waskey Act and the Act of May 31, 1938, and the fact that the 1938 Act covered the entire field. No confusion, no anomaly will result from such repeal. The anomaly will be cast aside and the law of Alaska will become consistent once more with "the laws of the United States relating to mining claims, mineral locations and rights incident thereto."

Since appellant has relied on Oregon law almost exclusively, it is interesting to note that the Oregon Constitution requires that a law may be amended only by insertion at length in the new act.

> Constitution of Oregon, sec. 22; 1 Oregon Code Annotated 113.

Such a provision undoubtedly influences Oregon courts in determining whether there has been an implied repeal of a separate intermediate act. As Judge Pratt has pointed out, however (*United States Smelting Refining & Mining Co. v. Lowe,* supra, at p. 921; Transcript of Record, pp. 148, 149), no such rule applies to acts of Congress.

A similar rule, that repealed statutes must be mentioned in the title of the repealing act, has also influenced Oregon courts.

> *State v. County Court* (1909) 54 Or. 255, 101 Pac. 907 (App. Br. pp. 12, 14, 18).

Once again, cases based on this rule can have no bearing on cases arising under acts of Congress.

Stated in a less confused fashion, appellant's third proposition which is called "Extent of Implied Repeal" (App. Br. pp. 34-48) is simply that the Act of May 31, 1938, admitting it abolished automatic forfeiture, nevertheless retained the burden of proof provisions of the Waskey Act.

This is merely a part of the general question of the repeal of the Waskey Act, which we have already considered, as a part of appellees' general argument on the repeal of the Waskey Act (supra, pp. 5-20). The inconsistencies exist in fact and are pointed out at page 14 above. No attempt to disguise these inconsistencies can help appellant's case.

It makes no difference whether other states have laws similar to the Waskey Act on the burden of proof point. We are discussing "the laws of the United States" as applied to the Territory of Alaska. Appellant cannot even sustain her own contention that the state laws generally support her argument since the only case cited by appellant refutes the argument.

In commenting on a New Mexico statute which, like the Waskey Act, shifted the burden of proof, the Supreme Court of New Mexico said:

> "This statute is unusual; New Mexico and Idaho being, as pointed out by Mr. Lindley (Lindley on Mines [2d Ed.] § 636), apparently the only jurisdictions having such a law" (*Upton v. Santa Rita Mining Co.* (1907) 14 N.M. 96, 89 Pac. 275, at p. 287) (App. Br. p. 46).

Without devoting further time to appellant's third proposition, we submit that the repeal of the Waskey Act by the Act of May 31, 1938, was a repeal of the burden of proof provision as well as of the forfeiture provision, under the rule of *Thatcher v. Brown,* supra.

2. The Repeal of the Waskey Act Put the Burden of Proving Forfeiture, Before and After its Repeal, on Appellant.

The repeal of the Waskey Act had a twofold effect on the burden of proof as applied to this case.

First. Appellant must support the burden of proof of any forfeiture claimed to have occurred before July 1, 1938.

Second. Appellant must prove that since July 1, 1938, appellees have failed either to perform the required annual labor on the claims in question or to record notices of intention to hold under the moratorium statutes, and that appellant relocated *before* appellees resumed work.

That appellant must support the burden of proof of any forfeiture prior to July 1, 1938, is the general rule, and the Act of May 31, 1938, reinaugurating it in Alaska, applies retrospectively.

Burden of proof is a procedural matter and may be changed by statute at any time. In matters of evidence and burden of proof, the latest statute governs even though passed after the substantive cause of action accrued.

> "Remedial statutes, such as this, which affect only the procedure and practice of the courts in the enforcement of a right, and which do not impair the right itself, or wholly destroy a pre-existing remedy,

> are retroactive in the sense that they must be applied to causes of action existing at the time of their passage in all cases where the suit is subsequently commenced'' (*Southern Indiana Ry. Co. v. Peyton* (1901) 157 Ind. 690, 61 N.E. 722, 723).

This rule has been applied in cases involving the shifting of the burden of proving or disproving contributory negligence.

Smith v. Freedman (1929) 268 Mass. 38, 167 N.E. 335;

Sackheim v. Pigueron (1915) 215 N.Y. 62, 109 N.E. 109;

Southern Indiana Ry. Co. v. Peyton, supra.

The New York Court of Appeals, holding that a statute permitted suit upon a money judgment, even though no such suit was possible at the time the judgment was entered, stated:

> ''It is the settled law that statutes relating to procedure are retroactive and prospective in their application without affirmative provisions to that effect'' (*Peace v. Wilson* (1906) 186 N.Y. 403, 79 N.E. 329, 330).

The same rule has been applied by many courts.

Bear Lake Irrigation Co. v. Garland (1896) 164 U.S. 1;

South Carolina v. Gaillard (1879) 101 U.S. 433;

Virginia & West Virginia Coal Co. v. Charles (W.D. Va. 1917) 251 Fed. 83, 127-128;

Carson v. Miami Coal Co. (1923) 194 Ind. 49, 141 N.E. 810;

Woodvine v. Dean (1907) 194 Mass. 40, 79 N.E. 882;

Stocker v. Foster (1901) 178 Mass. 591, 60 N.E. 407;

First Methodist Episcopal Church v. Fadden (1898) 8 N.D. 162, 77 N.W. 615;

Ensley v. State (1910) 4 Okl.Cr. 49, 109 Pac. 250;

Baxter v. Hamilton (1897) 20 Mont. 327, 51 Pac. 265.

The appellant has failed to prove any forfeiture and has, therefore, failed to support the burden of proof placed upon her.

In the second proposition (App. Br. pp. 29-34) appellant argues that appeal cannot affect rights vested or revive rights lost under the repealed statute. Assuming that to be true, we fail to see what bearing it has on this case. The only vested rights were those of appellees under the locations made in 1908. Appellant assumes as a fact in her brief (App. Br. p. 29) that appellees' locations were forfeited. This is the very question at issue and a question which was answered in appellees' favor in the lower court.

The ultimate answer to the question "Did appellees have any rights," turns upon the immediate answer to the question "Who has the burden of proof." We submit that on the basis of the authorities just cited the burden of proof is on appellant.

Only one case is cited in support of appellant's second proposition.

Perkins Mfg. Co. v. Clinton Const. Co. (1930) 211 Cal. 228, 295 Pac. 1 (App. Br. p. 33).

This case involved the effect of a statute repealing an earlier statute which made a contract void. The case held that the later act could not revive a void contract. There was no question in the case involving the effect on procedure of a repealing statute. In the case at bar the only question is procedural, and the case cited by appellant serves no useful purpose.

No one but appellant has suggested that substantive rights might be revived by repeal. Appellees' position is simply this: Burden of proof is a procedural matter, and the applicable rule is that in effect at the time of trial, regardless of when the substantive cause of action accrued. Appellant has failed to discuss this question, and has failed to prove the forfeiture she assumes throughout her brief.

In an attempt to evade the rule that burden of proof is a procedural matter appellant has consistently misstated and misinterpreted the Waskey Act.

The following is taken from page 32 of appellant's brief:

> "From 1908 to 1937 appellees and their predecessors were required to file proofs of labor and if they failed to do so *the presumption was that they did not do the work.*
>
> * * * * *
>
> Whether required to file a proof of labor for years subsequent to 1938 or not, appellees were undoubtedly required so to file in prior years and their failure to do so, *has created a continuing presumption that the work was not done during these years*" (underscoring supplied).

The Waskey Act says no such thing. It says:

> "And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor * * * Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements" (34 Stat. 1243) (underscoring supplied).

Appellant attempts to make the filing of an affidavit mandatory and to read into the Act a presumption that does not exist. The filing of an affidavit is not mandatory, it is permissive; a failure to file created no presumption, it simply fixed the burden of proof.

So long as the Waskey Act was in effect the owner could (a) file an affidavit that the work had been done or (b) do the labor and not file an affidavit. In the latter case the owner had the burden of proving his labor *but there was no presumption* that the work was *not* done. As pointed out above, the undoubted rule is that the burden of proof may be shifted retroactively. The burden of proof was on appellees until 1938; thereafter it was on appellant.

Secondly, appellant must prove that since July 1, 1938, appellees have failed either to perform the required annual labor on the claims in question or to record notices of intention to hold under pertinent moratorium statutes.

and that appellant relocated *before* appellees resumed work on such claims.

Appellant has admitted (App. Br. p. 10) inability to make the required proof and, therefore, cannot claim by virtue of any alleged forfeiture occurring after July 1, 1938.

3. **The Snow Shoe Fraction, as Described in the Decree Quieting Title, is a Valid Location.**

Appellant questions the validity of The Snow Shoe Fraction, as described in the decree quieting title, her theory being that it was originally staked as a larger claim and so as to overlap other claims. This is true. But the case cited by appellant to the effect that such a location is entirely void concerned only an attempt to include in one location several small noncontiguous fractions (*Stenfjeld v. Espe* (9 Cir. 1909) 171 Fed. 825 (App. Br. pp. 48, 49)). The true rule is stated by Judge Lindley in another section not cited by appellant:

> "In so far as the ground taken is vacant, each location, if properly made in other respects, will be valid" (Lindley on Mines (3d Ed. 1914) Vol. 2, sec. 373, p. 880).

All authorities discussing the subject have held that such a location, if otherwise valid, is void only as to the overlap.

> *Crown Point Min. Co. v. Buck* (8 Cir. 1899) 97 Fed. 462.

The reason for this rule is well stated in *Doe v. Tyler* (1887) 73 Cal. 21, 14 Pac. 375, where the court said (pp. 22, 376):

> "It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by two locations has been, which location was prior in time and superior in right; and it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient."

Doe v. Tyler, supra, is quoted with approval in *Upton v. Santa Rita Mining Co.* (1907) 14 N.M. 96, 89 Pac. 275, 286-287, from which case appellant has quoted at length (App. Br. pp. 46-47).

As appellant points out (App. Br. p. 49), The Snow Shoe Fraction, after portions were taken up in adjoining claims, was left as "a small triangle containing approximately two and one-half acres." The remainder, and the area described in the decree quieting title, is a single claim composed of one parcel. It is not a group of non-contiguous parcels described as one claim.

4. Appellees Are Entitled to the Attorney's Fee Set by the Lower Court.

Relying entirely on Oregon law, appellant has objected strenuously (App. Br. pp. 50-52) to the allowance to appellees by the district court of an attorney's fee of $500 (Tr. pp. 59, 62, 66-67).

Rather than take up further time in a discussion of a well-settled rule of law, we refer to Judge Wilbur's

opinion in the Alaskan case of *Forno v. Coyle* (9 Cir. 1935) 75 F.2d 692, at page 696:

> "The appellant relies upon a number of cases decided by the Supreme Court of Oregon since 1921. These cases are not in point, since, as the appellant himself observes, they construe section 561 of the Oregon Laws (Olson, 1920), which was almost identical with section 1341 of the Laws of Alaska, supra. Neither section 561 of the Oregon Laws nor section 1341 of the Alaska Laws, however, contains the provision as to 'reasonable' attorneys' fees 'to be fixed by the court,' which is found in the act of 1923, supra.
>
> As to the objection that 'no evidence was submitted to the jury' on the question of what was a 'reasonable' attorney's fee, we need only point out that no such evidence was necessary. In Globe Indemnity Co. v. Sulpho-Saline Bath Co. (C.C.A. 8) 299 F. 219, 222, certiorari denied, 266 U.S. 606, 45 S. Ct. 92, 69 L. Ed. 464, the court said: 'The further point, in connection with the allowance of this [attorney's] fee, that there was no evidence as to a reasonable amount is not open to examination. If it were, we would be inclined to hold that the court is as good [a] judge of reasonableness of attorney fees for services in that court as any one. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence, and, as such, advisory but not binding upon the court'."

See also *Pilgrim v. Grant* (1938) 9 Alaska 417.

The only difference between the Act of April 16, 1923 (Session Laws of Alaska, 1923, C. 38, pp. 46, 47), and the Act of March 27, 1947 (Session Laws of Alaska, 1947, C. 84, p. 220), under which appellees claim, is that the

earlier act specifically limited this allowance to actions in the district court.

CONCLUSION.

We respectfully submit that the general mining law of the United States was restored to Alaska with respect to the burden of proving forfeiture by the 1938 Act; that appellant was unable to meet that burden; that the jury's verdict and the judgment of the district court are correct; that The Snow Shoe Fraction location is valid; that the attorney's fees were properly allowed; and that the judgment of the district court should be affirmed.

Dated: January 28, 1949.

Respectfully submitted,

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